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No. 01-6978

In the Supreme Court of the United States

OCTOBER TERM, 2001

GARY ALBERT EWING,

Petitioner,

-v.-

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARY PRICE
Families Against Mandatory Minimums
1612 K Street, N.W.
Washington, D.C. 20006
(202) 822-6700

DONALD M. FALK
Counsel of Record
Mayer, Brown, Rowe & Maw
555 College Avenue
Palo Alto, California 94306
(650) 331-2030

ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, New York 10019
(212) 506-2500

Counsel for Amicus Curiae

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BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan association that conducts research, promotes advocacy, and educates the public about sentencing laws.[1] It was founded in 1991 to challenge inflexible and excessive penalties required by mandatory minimum sentencing. FAMM's 26,000 members include prisoners and their families, attorneys, judges, criminal justice experts, and concerned citizens.

FAMM is a leading voice for sentencing justice and sentencing reform. It conducts workshops for its members, publishes a newsletter, maintains a website, serves as a clearinghouse for the media, researches and places cases for pro bono litigation, litigates individual cases as amicus curiae and counsel of record, and provides input to the U.S. Sentencing Commission on guideline amendments and reform.

FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. FAMM has been particularly concerned with the application of the California Three Strikes statute in cases in which the mandatory sentence of life with parole eligibility only after 25 years is grossly disproportionate to the offense. The application of the mandatory minimum sentencing scheme in this case has passed beyond the realm of policy debate to the point that enforcement of constitutional norms by this Court is necessary.

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[1] No counsel for a party authored this brief in any part. No person, other than Families Against Mandatory Minimums and its counsel, has made a monetary contribution to the preparation or submission of this brief. See S. Ct. R. 37.6.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Gary Ewing received a sentence of 25 years to life in state prison for shoplifting three golf clubs, a crime so insignificant that California law permits it to be treated as a misdemeanor. Ewing will not be eligible for parole for at least 25 years, and even then, his chance of being paroled is practically nil. Ewing's situation is not unique in California, though it is unique *to* California, or nearly so. Two Justices of this Court observed last year that "some 319 California prisoners are now serving sentences of *25 years to life* for what would otherwise be *misdemeanor theft* under the California scheme." *Durden* v. *California*, 531 U.S. 1184, 1184 (2001) (Souter and Breyer, JJ., dissenting from denial of certiorari). That number is now 344. See CAL. DEP'T OF CORRECTIONS, SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION 2 (March 31, 2002). Indeed, the United States Department of Justice concluded that a "*majority* of California inmates have been sentenced [under the Three Strikes law] for non-violent crimes." U.S. DEP'T OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 5 (Sept. 1997) (emphasis added). That is still true. See CAL. DEP'T OF CORRECTIONS, *supra*, at 2-3. Indeed, of 7,167 persons now serving third-strike life terms, nearly 700 were imprisoned for theft, and a similar number were sentenced for simple drug possession. See *ibid.*[2]

As the Court recently confirmed, "[t]he Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins* v. *Virginia*, No. 00-8452, 536 U.S. __, slip op. at 5 (June 20, 2002).

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[2] In addition to the 344 persons convicted of petty theft, 108 persons convicted of grand theft and 217 convicted of automobile theft are now serving life sentences with a mandatory minimum of 25 years before parole eligibility. See CAL. DEP'T OF CORRECTIONS, *supra*, at 2.

Excessiveness in sentences assessed in terms of years, like other forms of unconstitutional excessiveness, is measured by the proportionality of the punishment to the offense. A life sentence without possibility of parole for 25 years is grossly and unconstitutionally disproportionate to the crime of theft. Even when the value of the goods stolen permits classification of the crime as a felony, non-violent theft is not among the more serious offenses. California itself treats the crime as a "wobbler," that is, either a misdemeanor or a felony at the option of the prosecutor and the court. While criminal history may justify a sentence at the high end of those constitutionally proportionate to the crime, shoplifting does not become the equivalent of rape or murder because the offender had a criminal past. Past crimes cannot be punished twice. Thus, no matter how serious the *past* crimes, the sentence for a present crime cannot be wholly disproportionate to that particular crime, as Ewing's sentence is here.

Ewing's subjection to life imprisonment without possibility of parole for 25 years results from the confluence of several aspects of California's Three Strikes law. California's law is the only one in the country that combines all of the following characteristics: (i) it does not require the third strike to be a serious or violent offense; (ii) it imposes a minimum sentence of 25 years; (iii) it excludes meaningful opportunities for parole; (iv) it does not require the prior "strikes" to have been tried or punished on separate occasions; and (v) it strictly limits sentencing judges' discretion to impose lesser sentences. In a number of cases, including this one, that combination of factors yields sentences that are "excessive punishments" of the type prohibited by the Eighth Amendment. *Atkins*, 536 U.S. __, slip op. at 6 n.7.

This combination of factors is specific to California's application of its one-size-fits-all mandatory minimum sentencing scheme to minor crimes. Thus, a ruling in

petitioner's favor would not undermine recidivist provisions generally. Few, if any, inmates in other States could present a similar case. The few other States whose laws might facially permit a similar sentence for a similar crime in practice appear to do so with exceeding rarity, while California now confines more than 700 persons under sentences of life without possibility of parole for 25 years for non-violent theft crimes. California's skewed sentencing mechanism has produced an egregiously disproportionate sentence that violates the Eighth Amendment and that therefore cannot stand.

ARGUMENT

It is a cardinal "precept of justice that punishment for crime should be graduated and proportioned to the offense.'" *Atkins*, 536 U.S. __, slip op. at 6 (quoting *Weems* v. *United States*, 217 U.S. 349, 367 (1910)). "[A] criminal sentence must be proportionate to *the crime for which the defendant has been convicted*." *Solem* v. *Helm*, 463 U.S. 277, 290 (1983) (emphasis added). This fundamental principle, which has its origins in the Magna Carta, "is deeply rooted and frequently repeated in common-law jurisprudence." *Id.* at 284. As the Court of the King's Bench declared nearly 400 years ago, "imprisonment ought always to be according to the quality of the offence." *Hodges* v. *Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (quoted in *Solem*, 463 U.S. at 285). Equally "deeply rooted" is the Due Process "principle that punishment should fit the crime." *BMW* v. *Gore*, 517 U.S. 559, 575 n.24 (1996).

This Court has "repeatedly applied this proportionality precept" in Eighth Amendment cases of all kinds. *Atkins*, 536 U.S. __, slip op. at 6. That is not to say that the Constitution requires precise proportionality in sentencing. But it is beyond dispute that punishments that are "grossly disproportional to the gravity" of the offense violate the Eighth Amendment. *Cooper*

Industries v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001) (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). See also, *e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 997-98 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring).

"A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. __, slip op. at 6. This Court has identified three factors to be considered in assessing the proportionality — and thus the constitutionality — of a criminal sentence: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. Accord *Cooper Industries*, 532 U.S. at 434; *Harmelin*, 501 U.S. at 1004-1005 (Kennedy, J., concurring).

The first comparison is the most important: measuring the sentence of life without the possibility of parole for 25 years against the gravity of the current crime, shoplifting expensive merchandise. See *Harmelin*, 501 U.S. at 997-1005 (Kennedy, J., concurring). The other comparisons provide objective confirmation for what in this case is obvious: the sentence of life without the possibility of parole for 25 years is grossly disproportionate to the crime of theft even against the backdrop of an array of prior offenses. The sentence accordingly is unconstitutional.

A. A Sentence of Life Without Possibility Of Parole For 25 Years Is Grossly Disproportionate To The Crime Of Non-Violent Theft

A "comparison of the crime committed and the sentence imposed" is the "threshold" test of a disproportionate sentence. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Ewing's sentence of a minimum of 25 years without parole for shoplifting golf clubs clearly crosses that threshold.

1. The primary benchmark against which the proportionality of a sentence is measured is the nature of the current offense for which the defendant is being punished. If that crime is non-violent and relatively minor, the defendant's past offenses cannot justify a draconian sentence. Although "a State is justified in punishing a recidivist more severely than it punishes a first offender," and a defendant's "prior convictions are relevant to the sentencing decision," courts reviewing a claim of cruel and unusual punishment "***must focus on the principal felony*** * * * since [the defendant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 296 & n.21 (emphasis added). Where the legislature considers the principal crime to be so minor that it is often charged and punished as a misdemeanor, that focus should be all the sharper. The Constitution permits recidivist statutes to subject repeat offenders to harsher punishment for their most recent crimes, but not to punish them again for previous crimes.

Thus, California cannot constitutionally impose upon a recidivist who commits grand theft an enhanced sentence that exceeds the permissible maximum for ***that*** crime. Just as the "sanction" of a 90-day jail term for drug addiction "would be excessive," *Atkins*, 536 U.S. __, slip op. at 6, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.'" *Solem*, 463 U.S. at 287 (quoting *Robinson* v. *California*, 370 U.S. 660, 667 (1962)).

This Court has noted that a sentence of life imprisonment for the crime of overtime parking would violate the Eighth Amendment. See *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980). That would be true even if the driver of the vehicle had a long rap sheet. The driver's criminal history might justify an enhanced penalty, perhaps even a brief stay behind bars. But even if the driver were John Gotti, a State could not constitutionally rely on that history to impose upon him a sentence of the sort usually reserved for murder, for the crime of failing to place another quarter in a parking meter, or jaywalking, or littering — or shoplifting golf clubs.

There is a compelling reason why the constitutionality of a defendant's sentence must be measured by the crime for which he is being punished, and not solely by his status as a repeat offender. "[I]n order to avoid double jeopardy concerns," this Court has "repeatedly emphasized" that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as * * * [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.' *Witte* v. *United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732, (1948))." *Riggs* v. *California*, 525 U.S. 1114, 1114 (1999) (op. of Stevens, J., respecting denial of certiorari).[3]

But the penalty, while "stiffened," nonetheless is a penalty for the current offense, not the prior ones. As the Court observed more than a century ago, under the enhanced penalties imposed by a recidivist statute, "the accused is not again

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[3] The former petitioner in *Riggs* is currently serving a sentence of 25 years to life for shoplifting a bottle of vitamins. That sentence also results from the interaction of the Three Strikes law and a wobbler statute. 525 U.S. at 1114.

punished for the first offence"; rather, "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895) (internal quotation marks omitted).

Accordingly, the fact that Ewing's ***prior*** offenses involved the potential for violence cannot render his current sentence constitutional, because his ***principal*** crime is a non-violent one.[4] The Ninth Circuit has reasoned that "[w]here the crime of conviction is a violent one, a more severe recidivist sentencing scheme for defendants with past convictions for violent crimes would simply reflect a judgment that such individuals cannot curb their violence and should therefore be imprisoned for at least a lengthy time and for as long as life. But where, as here, the present conviction does *not* demonstrate continued proclivity towards involvement in violent crime, distinguishing between criminals convicted for non-violent offenses on the basis of their *past* violence would run up against compelling Double Jeopardy Clause considerations." *Brown* v. *Mayle*, 283 F.3d 1019, 1035 (9th Cir.), petition for cert. filed, 70 USLW 3643 (Mar. 7, 2002) (No 01-1487).

Ewing's sentence cannot be justified on the basis of the State's desire to incapacitate an individual with a ***continued*** propensity to commit violent crimes, because the crime for which Ewing has been sentenced did not demonstrate any such propensity. To the contrary, one who commits a non-violent crime after having a more violent history would seem to be moving in the right direction, still warranting punishment, but

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[4] Ewing accumulated all of his prior strikes in a single criminal proceeding in 1993, in which he was convicted of three counts of burglary and one count of robbery. Two of the burglaries were non-violent. At the third, he brandished a knife; accordingly, that burglary was also charged as a robbery.

not on the scale of a violent offender.[5] Imprisoning a ***non-violent*** offender for more than 25 years on the basis of his ***past*** crimes of violence necessarily would impose an "additional penalty for [his] earlier crimes," for which he has already been punished. *Gryger*, 334 U.S. at 732; see *Solem*, 463 U.S. at 297 n.21; *Riggs*, 532 U.S. at 1114 (op. of Stevens, J., respecting denial of certiorari).[6] See also U.S. Const. amend. V.

2. In striking down a life sentence for passing a $100 "no account" check, this Court emphasized that although the

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[5] Bizarrely, had Ewing *escalated* his wrongdoing sequentially from shoplifting, to burglary, to robbery, his sentence for robbery in that event would be less than his sentence for shoplifting here, since the shoplifting would not qualify as a strike. That is not the only perverse effect of the California scheme. Because the California Three Strikes Law applies to nonviolent crimes and lacks a "wash out period" after which old prior convictions do not count as strikes, many of the inmates serving long sentences under California's Three Strikes law are older felons who are less likely to be dangerous than young, violent offenders. See Mike Males & Dan Macallair, *Striking Out: The Failure Of California's "Three Strikes And You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 67 (1999) (two thirds of offenders sentenced to life without possibility of parole for 25 years under Three Strikes law were between the ages of 30 and 50 at the time of admission to prison).

[6] As the *Brown* court observed (283 F.3d at 1037), moreover, the California statute itself

> does not distinguish between serious and violent prior offenses. Rather, Three Strikes references other sections of the California Penal Code, which exist for other purposes, to define what felonies count as prior strikes. * * * Although certain of these offenses * * * are labeled as violent, * * * [while others] are labeled as serious, the category into which prior convictions fit has absolutely no bearing on the application or length of a Three Strikes sentence.

defendant was sentenced as a habitual offender for having committed his seventh felony, his *principal* felony was "viewed by society as among the less serious offenses." *Solem*, 463 U.S. at 296. The sentence upheld in *Harmelin*, by contrast, was for possession of wholesale quantities of pure cocaine — a crime "far more grave than the crime at issue in *Solem*." 501 U.S. at 1001 (Kennedy, J., concurring). While the crime in *Harmelin* "threatened to cause grave harm to society," shoplifting golf clubs is a "relatively minor, nonviolent crime," *Id.* at 1002 (Kennedy, J., concurring), that is "among the less serious offenses," *Solem*, 463 U.S. at 296, no matter who the shoplifter may be. Ewing's record may provide a context that makes his shoplifting a more serious transgression than a first offense would be, but it is still shoplifting.

In determining whether Ewing's crime is "among the less serious offenses," the Court should focus on the actual conduct at issue, and not on the label placed on that conduct by the State. *Solem*, 463 U.S. at 296. The "absolute magnitude" of an offense is an objective consideration relevant to determining its gravity. *Id.* at 293.

Thus, calling shoplifting a felony instead of a misdemeanor does not alter the fact that the infraction is viewed by society as a relatively minor one. While California's "wobbler" provision permits Ewing's theft of three golf clubs to be charged either as a misdemeanor or as a felony, that very flexibility demonstrates ambivalence about the gravity of the crime even in that State.[7] Ewing's principal crime is not one that is universally recognized as serious and "punishable by significant terms of imprisonment in a state penitentiary." *Rummel*, 445 U.S. at

[7] Standing alone, Ewing's grand theft conviction would have resulted in a sentence of no more than three years, and might have garnered as little as 16 months. Cal. Penal Code §§ 489(b), 18 (West 2001).

274.[8] To the contrary, some States treat theft of property worth $1,200 as a misdemeanor, and most of the other States treat it as a low-grade felony. As a consequence, this offense most often is punished with short — even minimal — sentences.[9] Indeed, some shoplifters in California serve only misdemeanor

[8] Ewing's shoplifting offense did not "involve[] injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of [that crime] ordinarily involve a threat of violent action against another person or his property." *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

[9] See, *e.g.*, Ariz. Rev. Stat. § 13-701(A), (C)(4) (West 2001) (classifying offense as Class 5 felony punishable by one and one-half years in penitentiary); Del. Code Ann. tit. 11, § 4205 (2001) (Class G felony punishable by not more than two years); Ga. Code Ann. §§ 16-8-2, 16-8-12(a)(1), 17-10-3 (1999) (wobbler offense punishable by up to 12 months in county jail or 1 to 10 years in state penitentiary); Idaho Code § 18-2408(3) (Michie 1997) (misdemeanor punishable by not more than one year in county jail); Ind. Code Ann. § 35-50-2-7(a) (Michie 1998) (Class D felony punishable by one and one-half years in prison); Kan. Stat. Ann. § 21-4704(a) (West 2001) (assigning "severity level nine" to offense, which is punishable by 9 to 11 months in prison); Me. Rev. Stat. Ann. tit. 17-A, § 1252(2)(D) (West Supp. 2001) (Class D crime punishable by less than one year in prison); N.J. Stat. Ann. § 2C:20-11(c) (West 1995) (amended 2000) (disorderly persons offense punishable by no more than six months in prison); N.M. Stat. Ann. § 31-18-15(A)(6) (Michie 2000) (fourth degree felony punishable by 18 months in prison); N.C. Gen. Stat. §§ 15A-1340.17(c), (d); 14-72(a) (1999) (Class H felony punishable by one year to 30 months in prison); Ohio Rev. Code Ann. § 2929.14(A)(5) (West 2001) (fifth degree felony punishable by six to 12 months in prison); 18 Pa. Cons. Stat. Ann. § 1104(3) (West 1998) (first degree misdemeanor punishable by not more than one year in prison); Tex. Penal Code Ann. § 12.21(2) (Vernon 2002) (Class A misdemeanor punishable by not more than one year).

terms in the county jail even when convicted of grand theft, as Ewing was here.

3. The unconstitutional result in this case stems in part from the fact that California's recidivist statute, unlike those of other jurisdictions, shifts the focus almost *entirely* away from the principal crime. Under California's Three Strikes Law, *any* felony — major or minor, violent or non-violent — can serve as the third strike that triggers a sentence of life in prison with no possibility of parole for at least 25 years.[10] That is so even if the "felony" is so marginal that, like the theft in this case, it is not even consistently categorized as a felony at all.

The California statute enumerates the broad set of felonies that the State considers sufficiently "serious" or "violent" to serve as first and second "strikes." Cal. Penal Code §§ 667.5(c)(1), (12), (14); 1192.7(c)(1), (9), (20), (31) (West 2001). If the defendant's ***prior*** offenses were among those enumerated on the list, he is subject to a life sentence, ***regardless of the nature of the principal felony***. Thus, Ewing's conviction for grand theft produced a sentence of life without the possibility of parole for 25 years even though grand theft itself could not even count as a "strike." The California scheme's nearly complete reliance on the nature of the crimes for which a defendant already has been punished, rather than on the gravity of the offense for which he currently is being

[10] By contrast, before the Three Strikes Law, California's recidivism scheme imposed 20 years to life for a third *violent* felony conviction if the defendant served *separate* prison terms for the first two sentences, and provided life without parole for the fourth *violent* felony conviction. Cal. Penal Code § 667(a)(1), (2) (West 1994). Under the current scheme, a defendant with a violent third strike *and* violent priors receives an additional consecutive five-year term *for each prior*, further enhancing the focus on past rather than present conduct. See Cal. Penal Code § 667(a) (West 2001).

sentenced, causes the Three Strikes law to produce sentences that fail even the narrow constitutional proportionality test once "focus" properly rests "on the principal felony." *Solem*, 463 U.S. at 296 n.21.

B. Ewing's Sentence Is Excessive When Compared To Punishments Imposed For The Same Crime In-Other Jurisdictions.

Once "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," a "comparative analysis of sentences" for other crimes in the same jurisdiction is appropriate, as is a similar analysis of sentences for the same crime in other States. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Having nothing to add to the petitioner's persuasive treatment of the *intra*jurisdictional analysis, we focus on a few salient points arising from the *inter*jurisdictional comparison. That analysis reveals that except for Mississippi — which would not have applied its maximum recidivist penalty to Ewing on the basis of his history — no State imposes a *mandatory minimum* for grand theft shoplifting that even approaches the 25 years without parole imposed on Ewing.

This Court recently reaffirmed the importance of the inter-jurisdictional comparison in the evaluation of an Eighth Amendment claim. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. __, slip op. at 7 (internal quotation marks omitted). Accordingly, that California stands nearly alone in punishing shoplifting by a recidivist with a mandatory minimum sentence of life in prison

without the possibility of parole for 25 years is highly probative of that penalty's unconstitutionality.[11]

To our knowledge, no other State would impose a term of imprisonment that approaches the severity of the 25 years to life sentence — with no possibility of parole — imposed on Ewing for the crime of shoplifting three golf clubs with his record of prior offenses. In many States, Ewing's theft would not qualify him for the increased penalties applicable to a habitual offender.[12] Even in States where a thief in Ewing's

[11] In light of the Court's instruction that the constitutionality of a punishment must be measured against the "*evolving* standards of decency," see *Atkins*, 536 U.S. __, slip op. at 6 (emphasis added) (citation and internal quotation marks omitted), the analysis that follows is based upon the current versions of the States' sentencing schemes, not those in place in 1994, when Ewing was sentenced. The differences are not substantial.

[12] Of the 48 States (plus the District of Columbia) with general recidivist statutes, 22 jurisdictions would not apply enhancements under those statutes based upon Ewing's principal crime and criminal history. See Colo. Rev. Stat. § 16-13-01 (West 2001); *Buckingham v. State*, 482 A.2d 327 (Del. 1984); D.C. Code §§ 22-1804, 1804(a) (West 2001); *State v. Harrington*, 990 P.2d 144 (Idaho Ct. App. 1999); 720 Ill. Comp. Stat. § 5/33B-1 (West 2002); Ind. Code § 35-50-2-8 (West 2001); Me. Rev. Stat. Ann. Tit. 17-A, § 1252 (West 2001); Md. Code Ann. Art. 27 § 643B (West 2001); Mass. Gen. Laws Ch. 279, § 25 (West 2002); Minn. Stat. Ann. § 609.1095 (West 2001); Miss. Code Ann. § 99-19-81 (West 2001); Neb. Rev. Stat. § 29-2221 (West 2001); N.H. Rev. Stat. Ann. § 651:6 (West 2001); N.J. Stat. Ann. § 2C:44-3 (West 2002); N.C. Gen. Stat. §§ 14-7.1, 14-7.6 (West 2001); 42 Pa. Stat. Ann. § 9714 (West 2002); R.I. Gen. Laws § 12-19-21 (West 2001); S.C. Code Ann. § 17-25-45 (West 2001); Utah Code Ann. § 76-3-203.5 (West 2001); Va. Code Ann. § 19.2-297.1 (West 2002); Wash. Rev. Code §§ 9.94A.030, 9.94A.570 (West 2002); Wy. Stat. Ann. § 6-10-201 (West 2002). Some of these states would apply a variety of lesser enhancements based on Ewing's

shoes could be sentenced as a recidivist, the resulting sentence would be substantially shorter than that imposed by California in this case.

Several variables determine the impact of each State's recidivist statute. Many commentators have noted that California's Three Strikes Law is more draconian than that of virtually any other State because its legislature took the harshest possible position on nearly every pertinent variable. See, *e.g.*, Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 402 (1997); Marc Mauer, *Why Are Tough On Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11-12 (1999); Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 55-57 (2001).

That is not to say that harshness equates with unconstitutionality. Many sentences may be long, even harsh, but constitutional. But Ewing's sentence results from a bizarre, synergistic reaction among at least five factors: (i) the offenses that qualify as a third strike; (ii) the length of the sentence imposed; (iii) the availability of parole; (iv) the treatment of closely related offenses as separate "strikes"; and (v) the discretion afforded to sentencing courts. That confluence, in this case, has produced a grossly disproportionate — and hence unconstitutional — sentence.

1. ***Grand theft as a third strike.*** Of course, if the most significant enhancements for recidivism do not apply with full force to minor crimes, there is far less risk that a sentence produced by a recidivism enhancement will be grossly and unconstitutionally disproportionate to the crime of conviction. Twelve States minimize the risk of unconstitutional results in

record, but the resulting sentences would not raise constitutional concerns.

this way by providing that only the most serious and violent felonies trigger the heavy penalties imposed by their habitual offender statutes; theft is not among those crimes.[13]

2. ***25-year-to-life sentence for grand theft with priors.*** Although 35 States treat theft of property worth $1,200 as an offense triggering an enhanced penalty, the majority of those States ensure that those penalties are proportionate to the gravity of the offense.[14] Accordingly, in the majority of those States, Ewing would receive a maximum sentence far shorter than life in prison without possibility of parole for 25 years.[15]

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[13] See Colo. Rev. Stat. § 16-13-01; 720 Ill. Comp. Stat. § 5/33B-1; Ind. Code § 35-50-2-8; Me. Rev. Stat. Ann. Tit. 17-A, § 1252; Md. Code Ann. Art. 27 § 643B; Minn. Stat. Ann. § 609.1095; 42 Pa. Stat. Ann. § 9714; S.C. Code Ann. § 17-25-45; Utah Code Ann. § 76-3-203.5; Va. Stat. § 19.2-297.1; Wash. Rev. Code §§ 9.94A.030, 9.94A.570; Wy. Stat. Ann. § 6-10-201.

[14] In nine of those States and the District of Columbia, however, Ewing's record would not expose him to repeat-offender treatment. See pages 20-21 *infra*.

[15] See Alaska Stat. § 12.55.125 (West 2001) (three to five years; presumptive sentence of three years); Ariz. Rev. Stat. § 13-604 (West 2002) (4 to 6 years; presumptive sentence of five years); Conn. Gen. Stat. § 53a-40 (West 2001) (one to ten years); Fla. Stat. Ann. § 775.084 (West 2001) (up to ten years); Ga. Code Ann. § 17-10-7 (West 2001) (ten years); Haw. Rev. Stat. § 706-605.5 (West 2001) (twenty months); Idaho Code § 19-2514 (West 2001) (inapplicable as a result of judicially-imposed separate occurrences requirement, but sentence would be five years if statute were applicable); Iowa Code § 902.8 (West 2002) (three to five years); Kan. Stat. Ann. § 21-4704 (less than eighteen months); Ky. Rev. Stat. Ann. § 532.080 (West 2001) (maximum sentence of five to ten years); Mich. Comp. Laws § 769.12 (West 2002) (up to 15 years); N.J. Stat. Ann. § 2C:44-3 (West 2002) (inapplicable as a result of separate occurrences

Logically enough, many States punish recidivists by sentencing them to the terms normally applicable to an offense one degree more serious than the principal crime. In such jurisdictions, therefore, a recidivist who commits a minor crime receives a substantial, but not unconstitutional, penalty; a recidivist who commits a major crime is locked up for life. In Connecticut, for example, if an offender has a prior felony offense, his sentence for the principal crime is enhanced to the penalty applicable to the "next more serious degree of felony." Conn. Gen. Stat. § 53a-40 (West 2001). Accordingly, in Connecticut Ewing would be sentenced to one to ten years — a substantial penalty for shoplifting, but not one that shocks the conscience. Kentucky, similarly, sentences repeat offenders to a term that would ordinarily be applicable to the "next highest degree" offense, Ky. Rev. Stat. Ann. § 532.080 (West 2001); Ewing would be sentenced to a maximum term of five to ten years. New Mexico would add one year to Ewing's base sentence, for a total term of two and one half years. N.M. Stat. Ann. § 31-18-17 (West 2001). In Georgia, any fourth felony triggers the recidivist statute, but the penalty is the mandatory maximum sentence for the felony charged. See Ga. Code Ann. § 17-10-7 (2001). There, Ewing would receive a maximum sentence of ten years.

3. ***Unavailability of parole and denial of "good time."*** California Three Strikes inmates essentially serve life sentences

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requirement, but sentence would be five to ten years if statute were applicable); N.M. Stat. Ann. § 31-18-17 (West 2001) (two and one half years); N.Y. Penal Law § 70.06 (McKinney 2002) (three to four years); N.C. Gen. Stat. §§ 14-7.1, 14-7.6 (West 2001) (inapplicable as a result of separate occurrences requirement, but sentence would be 80 to 100 months if statute were applicable); N.D. Cent. Code § 12.1-32-09 (West 2001) (maximum of ten years); Tenn. Code Ann. § 40-35-106 (West 2001) (four to eight years); Wis. Stat. Ann. § 939.62 (West 2001) (up to three years).

with only a slim possibility of parole beginning only after the inmate has served 25 years. Ewing, like other Three Strike inmates, will spend at least 25 years behind bars before he will be eligible for parole; he cannot receive any credit for good conduct in prison. See *In re Cervera*, 16 P.3d 176, 180 (Cal. 2001) (holding that a Three Strikes convict must serve at least the full 25-year minimum term). Like every California inmate who is sentenced to life imprisonment with the possibility of parole, Ewing will not be paroled without the approval of the Board of Prison Terms. According to a Board spokeswoman, the Board recommends parole in less than one percent of the 2,000 indeterminate life-imprisonment cases it considers each year. See Paul Van Slambrouck, *Getting Even Tougher*, Christian Science Monitor, May 22, 2000, at 3 (2000 WL 4428277); Dave Lesher, *Davis Takes Hard Line on Parole for Killers*, L.A. Times, April 9, 1999, at A3 (1999 WL 2147545). The rarity of parole is not a passing fad in California. Seven years ago, this Court observed that 90 percent of *all* California inmates are denied parole at their first hearing, and 85 percent fail at subsequent hearings. See *California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 510-11 (1995).

Outside California, the States with the most severe recidivist statutes — the only States in which Ewing could be sentenced as a repeat offender to a lengthy prison term — permit much earlier access to parole. In Alabama, for example, Ewing's theft would constitute a Class B felony, *see* Ala. Code § 13A-8-3 (West 2001), which could result in a sentence of "life or any term of not less than 20 years" under that State's habitual offender statute. *Id.* § 13A-5-9(c)(2). But Ewing would be eligible for parole after the lesser of "one third [of his sentence] or ten years." *Id.* § 15-22-28. Similarly, a Vermont court would have the discretion to impose upon Ewing a sentence of "up to and including life" pursuant to that State's recidivist statute, 13 Vt. Stat. Ann. § 11 (West 2001).

However, even if he were sentenced to life, Ewing would be up for parole after serving only ***one year*** of his sentence. *See* 28 Vt. Stat. Ann. § 501 (West 2001); *State* v. *Battick*, 349 A.2d 221, 222 (Vt. 1975). In Arkansas, Ewing's sentence would be between 3 and 20 years, but he would be up for parole after serving one third of his sentence. Ark. Code Ann. §§ 5-4-501, 16-93-608 (West 2001).[16]

The unavailability of parole in California is of constitutional significance. This Court upheld the sentence in *Rummel* in large part because the petitioner — unlike Ewing — was likely to be paroled early. Under the Texas system at issue in that case, a prisoner serving a life sentence could be eligible for parole in ten years and would be expected, in the ordinary course of events, to be eligible in twelve years. 445 U.S. at 280; see also *Solem*, 463 U.S. at 301-02. Ewing, by contrast, will not be eligible for parole for at least 25 years, and even then the chances against parole are 99 to 1. See Lesher, *supra*.

In determining whether a sentence is grossly disproportionate to the crime, this Court considers the actual operation of the parole policy, and not just its existence:

> In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to

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[16] See also Mo. Rev. Stat. §§ 558-016, 558.011 (West 2002) (Ewing would be sentenced to a term "not to exceed twenty years," but would be eligible for parole after 15 years); Mont. Code Ann. §§ 46-18-501, 46-18-502, 46-23-201 (West 2001) (Ewing would be sentenced to between ten and 100 years, but would be eligible for parole after one-fourth of term); Tex. Gen. Laws § 12.43, Tex. Gov't § 508.145 (sentence would be between two and 20 years, but Ewing would be eligible for parole after serving one fourth of his sentence); W. Va. Code §§ 61-11-18, 62-12-13(c) (West 2001) (court could but likely would not, (see page 24 *infra*) impose a life sentence, but Ewing would be eligible for parole after 15 years).

> the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners * * * ."

Solem, 463 U.S. at 301 (emphasis added), quoting *Rummel*, 445 U.S. at 280. In *Solem*, this Court stated that the petitioner's lack of opportunity for parole rendered his sentence "far more severe than the life sentence we considered in *Rummel*." 463 U.S. at 297. Ewing can receive no credit for good time, and cannot even seek parole for 25 years. Because Ewing is likely to spend the rest of his life in prison, the sentence imposed here is as disproportionate as that deemed unconstitutional in *Solem*, and is "far more severe" than that upheld in *Rummel*.

4. ***No "separate occurrences" requirement.*** Ewing's four prior convictions all resulted from a single criminal proceeding in 1994. Accordingly, Ewing would not be subject to the habitual offender statutes of Delaware, the District of Columbia, Idaho, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, or Rhode Island.[17] With some variations on the theme, all of those States provide that prior

[17] See *Buckingham v. State*, 482 A.2d 327 (Del. 1984); D.C. Code §§ 1804, 1804(a); *State v. Harrington*, 990 P.2d 144 (Idaho Ct. App. 1999); Miss. Code Ann. § 99-19-81; Neb. Rev. Stat. § 29-2221; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. Ann. § 2C:44-3; N.C. Gen. Stat. §§ 14-7.1, 14-7.6; R.I. Gen. Laws § 12-19-21. The recidivist statutes of Colorado, Illinois, Indiana, Maryland, Minnesota, Virginia, Washington, and Wyoming also include separate-occurrences provisions that would preclude Ewing from being sentenced as a multiple offender; however, those states also would not characterize Ewing's theft as a triggering offense, would not consider his prior offenses to be strike crimes, or both. In some of those states, Ewing might be subject to lesser enhancements based on his record, but the general habitual offender statute would not apply and Ewing would not be subject to a sentence approaching the 25 years to life that he received in California.

felony convictions only count as separate "strikes" if they arose from separate proceedings or resulted in separate sentences. See, *e.g.*, Miss. Code Ann. § 99-19-81 (West 2001). Under such statutes, Ewing's prior convictions would only count as one "strike," because he was charged in a single proceeding and served one term in prison.

The separate-occurrences requirement recognizes that habitual criminals should only be subjected to greatly enhanced sentences if they demonstrate a repeated failure to learn from the consequences of their felonious acts and to modify their behavior. This Court found that factor significant in *Rummel*, observing that under the Texas statute, "the State must prove that each succeeding conviction was subsequent to both the commission of and the conviction for the prior sentence." 445 U.S. at 278 n.16.[18] All of Ewing's strike convictions occurred at once and resulted in a functionally single term of incarceration. Moreover, the crime that triggered the application of the recidivism statute was far less serious than the crimes that qualified him for such treatment.

5. California's mandatory minimum deprives sentencing courts of almost all discretion. At first glance, Nevada's habitual offender statute appears as harsh or harsher than California's with respect to its penalty for grand theft with priors. Under the Nevada statute, Nev. St. § 207.010(1)(b) (West 2001), a four-time felon like Ewing could theoretically be sentenced to life without parole.

There is an important practical difference between the Nevada and California regimes, however: Nevada courts have much greater discretion to impose lighter sentences. First of

[18] Pursuant to Texas' separate occurrences provision, Ewing would be subject to a penalty under the habitual offender as a second-time offender. He would, however, be eligible for parole after serving one-fourth of his sentence. See n. 16 *supra*.

all, in Nevada the sentencing court has an affirmative obligation to consider whether it is appropriate to sentence a defendant as a habitual offender. See, *e.g.*, *Clark* v. *State*, 851 P.2d 426, 429 (Nev. 1993) ("[I]t was incumbent upon the trial court to weigh properly whether the habitual criminality count should have been dismissed pursuant to [its] discretion.").[19]

Even more significantly, as this Court observed in *Solem* (463 U.S. at 300), the Nevada statute expressly provides that, even after determining that the defendant is a habitual offender, the court can choose to impose a shorter sentence. Two of the court's three sentencing options are (i) life with the possibility of parole and (ii) a definite term of twenty-five years with the possibility of parole. In either case, and by contrast with California, *parole eligibility begins after only ten years* of time served. See Nev. Rev. Stat. § 207.010(1)(b). Other States with schemes less severe than Nevada's also provide greater discretion to the sentencing court so that excessive punishments can be avoided.[20]

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[19] California courts have limited discretion to strike allegations of prior convictions, and thereby to avoid application of the statute. See *People* v. *Superior Court of San Diego (Romero)*, 917 P.2d 628 (Cal. 1996). Unless a court takes the extraordinary step of "striking a strike," it *must* impose a sentence of 25 years to life, despite the fact that the defendant will not be eligible for parole until he has served 25 years. See *id.* at 648 ("To guide the lower courts in the exercise of their discretion * * * we emphasize the following: A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited."); Cal. Penal Code § 667(e)(2)(A) (West 1994).

[20] See, *e.g.*, Conn. Gen. Stat. § 53a-40(h) (enhanced sentence is only imposed if the defendant "has been found to be a persistent dangerous felony offender," *and* "the court is of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest"). In Vermont, similarly, a court would have discretion to sentence Ewing to the sentence that is specified for his shoplifting offense standing alone. See Vt. Stat. Ann. tit. 13, §§ 11, 501; *State* v. *Angelucci*, 405 A.2d 33 (Vt. 1979). See also, *e.g.*, Ark. Code Ann. § 5-4-501 (setting broad sentencing ranges for repeat offenders; Ewing's sentence would be between 3 and 20 years); Del. Code Ann. tit. 11 § 4214(a) (West 2001) (same; sentence would be between 2 years and life) (note that Ewing would not be sentenced as a repeat offender in Delaware as the result of a court-imposed separate offense requirement); Mich. Stat. Ann. § 769.12 (West 2002) (same; sentence would be any term up to 15 years); Okla. Stat. Ann. Tit. 21, § 51.1 (West 2001) (setting broad sentencing ranges for repeat offenders; sentence would be four years to life); S.D. Codified Laws § 22-7-8 (Michie 2001) (same; sentence would be "up to life," but statute sets no minimum term; if Ewing were sentenced to any term less than life, he would be eligible for parole after serving three-eighths of his sentence).

As this Court explained in *Solem*, it is generally the role of the courts to make distinctions among offenders, "and courts traditionally have made these judgments — just as legislatures must make them in the first instance." 463 U.S. at 292. The lower courts are quite capable of using their discretion to "judge the gravity of an offense, at least on a relative scale. * * * Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." *Ibid.* In determining the gravity of a particular offense, courts can consider not only the "absolute magnitude of the offense" and whether violence is involved, but also more subtle factors, such as the defendant's intent and his motive. *Id.* at 293. Courts also can "compare different sentences. * * * The courts are constantly called upon to draw similar lines in a variety of contexts." *Ibid.*

In California, the legislature has removed from the courts the power to distinguish among offenders and offenses: it has mandated that all third-time felony offenders be treated alike. By contrast, in the States where courts retain some discretion in

sentencing recidivists, that appears sufficient (with extremely rare exceptions) to prevent the imposition of sentences so grossly disproportionate as to raise the constitutional issues presented here and in the cases of the hundreds of other Californians imprisoned for a mandatory minimum of 25 years, and probably for life, for non-violent theft. That discretion generally keeps the systems in other States within constitutional bounds. But that constitutional failsafe is absent in California.

* * *

Enforcing the constitutional guarantee against excessive punishments in this case would not unduly impose federal standards on state police powers. State courts themselves have stepped in to invalidate as unconstitutionally excessive sentences imposed under circumstances similar to those here. In States in which the statutes facially permit such excesses, and lower courts have not exercised their discretion to keep the sentences within permissible bounds, state supreme courts have relied upon state and federal constitutional provisions to enforce mainstream notions of proportionality.

Although the statutes of Louisiana, for example, at one time appeared to authorize a life sentence for recidivists who committed non-violent theft crimes, the Louisiana courts would not permit that outcome. When the Louisiana Supreme Court considered whether a life sentence under the Louisiana recidivism statute could be imposed upon a "fourth offender" who was "before the court on [a] non-violent crime" — possessing stolen property — the court observed that the sentence "appears to be unconstitutionally excessive," vacated the sentence, and remanded for resentencing. *State ex rel. Walgamotte* v. *Blackburn*, 481 So. 2d 1322, 1323 (La. 1986).[21]

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[21] See also, *e.g.*, *State* v. *Lindsey*, 770 So. 2d 339, 343-44 (La. 2000) (holding that life sentence imposed for purse snatching under habitual offender statute violated Louisiana Constitution), cert. denied, 532 U.S. 1010 (2001); *State* v. *Dorthey*, 623 So. 2d 1276, 1280 (La. 1993) ("Louisiana's judiciary maintains the distinct responsibility of reviewing sentences imposed in criminal cases [under the habitual offender statute] for constitutional excessiveness."); *State* v. *Hayes*, 739 So. 2d 301, 303-04 (La. Ct. App. 1999) (sentence of life imprisonment without parole was excessive penalty for theft of $1,000).

In West Virginia, if Ewing were prosecuted under the general petit larceny statute, W. Va. Code § 61-3-13 (West 2001), rather than the shoplifting statute that fits his crime more closely, *id.* § 61-3A-1 *et seq.*), his offense might in theory might have led to a life sentence. See *id.* § 61-11-18. West Virginia case law, however, would not permit that result. The Supreme Court of Appeals of West Virginia struck down a statute providing a mandatory *one-year* sentence for felony third-offense shoplifting as a violation of both state and federal proscriptions of cruel and unusual punishment, being unable "with a clear collective conscience, [to] conclude that Appellant deserves to be imprisoned for a minimum of one year for failing to pay for $8.83 worth of groceries." *State* v. *Lewis*, 447 S.E.2d 570, 575 (W. Va. 1994). The same court likewise has held unconstitutional on state-law grounds mandatory life sentences imposed under a general recidivist statute for petty forgeries. *State* v. *Barker*, 410 S.E.2d 712, 713-14 (W. Va. 1991); *Wanstreet* v. *Bordenkircher*, 276 S.E.2d 205, 211-14 (W. Va. 1981). And that court held unconstitutionally excessive a life sentence for possession of marijuana with intent to distribute it, even though the defendant's prior offenses included unlawful wounding. *State* v. *Deal*, 358 S.E.2d 226, 230-31 (W. Va. 1987). Accordingly, the courts of West Virginia would not countenance a sentence of life without the

possibility of parole for 25 years for the crime of shoplifting golf clubs.[22]

The California courts, by contrast, have repeatedly declined to impose limits on the application of the Three Strikes Law to "wobblers" or other non-violent crimes. See, *e.g.*, *People* v. *Cline*, 60 Cal. App. 4th 1327 (1998) (upholding sentence of life without parole for 25 years for grand theft); *People* v. *Terry*, 47 Cal. App. 4th 329 (1996) (upholding sentence of life without parole for 25 years for third strike of petty theft that "wobbled up" to a felony).

No single feature of California's Three Strikes statute makes it unique among the States. Rather, it is the fact that California stakes out the most extreme position on every pertinent variable that renders many of the sentences imposed under it, including Ewing's, uniquely and grossly disproportionate. No other State's recidivist statute is triggered by any felony, no matter how minor; provides for a mandatory minimum sentence of 25 years to life; denies parole to all three-strikers as a matter of law for the first 25 years of their sentences; counts as separate strikes prior felonies that were all adjudicated in a single proceeding; ***and*** grants its courts almost no discretion to impose a reduced enhancement where the principal crime is a minor one. In no other State would Ewing be sentenced to 25 years to life for shoplifting three golf clubs. That circumstance confirms the "inference of gross disproportionality" (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)) that arises from the mere comparison of that sentence with that crime. The sentence is unconstitutional, and should be vacated.

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[22] In any event, a recidivist receiving a life sentence in West Virginia is eligible for parole after serving 15 years (W.Va. Code § 62-12-13(c)) (West 2001). That is ten years sooner than Ewing is likely to have his first opportunity for parole.

CONCLUSION

The judgment of the Court of Appeal of the State of California should be reversed.

Respectfully submitted.

MARY PRICE
Families Against Mandatory Minimums
1612 K Street, N.W.
Washington, D.C. 20006
(202) 822-6700

DONALD M. FALK
Counsel of Record
Mayer, Brown, Rowe & Maw
555 College Avenue
Palo Alto, California 94306
(650) 331-2030

ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, New York 10019
(212) 506-2500

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